Supreme Court, U.S.
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No. 04-858

In The

Supreme Court of the United States

JAMES MCINERNEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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October 14, 2004

QUESTIONS PRESENTED

1. Whether the Petitioner's sentence must be reduced under this Court's recent decision in *Blakely v. Washington*, ___ U.S. ___ (2004), in that the Petitioner's sentence was based, in part, on facts that were not found by a jury or stipulated by the Petitioner?

2. Whether the district court erroneously instructed the jury that a Rule 10(B)-6 violation could serve as the basis for a conviction under Count 2 of the Indictment?

3. Whether the Petitioner was rendered ineffective assistance of counsel by the failure of counsel to object to the erroneous instruction that a Rule 19(B)-6 violation could serve as a basis for a conviction under Count 2 of the Indictment?

PARTIES TO THE PROCEEDING

The Petitioner in this Court is James McInerney. The Petitioner had the following co-defendants on appeal: Michael Newman, Steven Jaross, Steven Orandella and Victor DiFrisco. The Respondent is the United States of America.

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PETITION FOR CERTIORARI

The Petitioner, James McInerney, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The Summary Order of the court of appeals affirming Mr. McInerney's conviction and sentence (Appendix A) was not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 2003. The jurisdiction of this Court is

invoked under 28 U.S.C. § 1254(1). The United States District Court for the Eastern District of New York had jurisdiction under 18 U.S.C. § 3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Securities and Exchange Rule 10 (B-6) provides, in relevant part, as follows:

> It shall be unlawful for any person who is a broker or other person who has agreed to participate or is participating in a particular distribution of securities, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, either alone or with one or more other persons, to attempt to induce any person to purchase any security which is the subject of distribution, or any security of the same class and series, or any right to purchase such security until after he has completed his participation in such distribution.

The Sixth Amendment to the United States Constitution states, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .

STATEMENT OF THE CASE

In or about 1999, the Petitioner was charged with one count of conspiring to violate Section 10(B) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78(ff)(a), by violating Securities Exchange Act Rules 10(B)-5 and 10(B)-6) (rescinded January 7, 1997), and one count of violating Section 10(B) by violating Rule 10(B)-5. The Indictment did not specify the amount of loss suffered as a consequence of the indicted conduct. Nor did it ask the jury to determine such loss.

The Petitioner went to trial wherein it was disclosed that the Petitioner had been a stockbroker for a now-defunct brokerage firm called Kensington Wells ("Kensington Wells"). According to the testimony elicited from the Government's witnesses, the owners and principals of Kensington Wells agreed to underwrite IPO's (Initial Public Offerings) for personal gain. One of the principals testified for the Government that he and the other owners would first obtain a large block of stock in a privately-held company at very low cost. The stocks to be issued were then doled out to firms or individuals who were considered friendly, or were issued to nominee accounts which were secretly controlled by the principals. The friendly parties or nominees then "flipped" or sold their allocations of stocks back to Kensington Wells, at a profit, on the same day of trading. As a result, Kensington Wells was able to control the supply of the stocks.

Substantial evidence suggested that the principals of Kensington Wells, who were not on trial and had obtained favorable dispositions after reeking large profits, used a variety of manipulative devices to artificially inflate the price of various securities. This market manipulation

occurred both on the day of each security's initial public offering ("IPO") and in subsequent trading on the open market. The Petitioner vigorously contended that he had not been a part of the fraudulent practices of the principals of Kensington Wells. The Government submitted proposed jury instructions, which, as to Count 2, properly referenced Rule 10(B)-5 and not Rule 10(B)-6. However, the district court instructed the jury that the defendants could be convicted under Count 2 of the Indictment if they violated either Rule 10(B)-5 or Rule 10(B)-6.

The jury acquitted the Petitioner of Count 1 of the Indictment but convicted him under Count 2. Prior to sentencing, the Pre-Sentence Investigation Report calculated the Petitioner's sentence as follows:

Base Offense Level	6
Total Loss of $12,422,875	15
More Than Minimal Planning/ Scheme to Defraud More Than One Victim	2
Abuse of Position of Trust	2
Total Offense Level:	25

The Pre-Sentence Investigation Report recommended a term of supervised release of not more than 3 years.

Defense counsel for the Petitioner submitted a

sentencing memorandum which contested the increase in the offense level based upon the amount of the loss, and the two-level adjustment for abuse of trust. The district court found that the adjustments in the offense level reflected in the Pre-Sentence Investigation Report should be applied to the Petitioner's sentence. The district court imposed a sentence of imprisonment of 37 months incarceration to be followed by a term of 3 years of supervised release. Based on the court's finding of amount of the loss for which the Petitioner was accountable, the court ordered the Petitioner to pay $100,000.00 in restitution.

The Petitioner appealed to the United States Court of Appeals for the Second Circuit on several grounds. Among other things, the Petitioner contended that the district court had erroneously instructed the jury that a Rule 10(B)-6 violation could serve as the basis for a conviction under Count 2 of the Indictment. On September 4, 2003, the Second Circuit issued a Summary Order affirming the Petitioner's conviction. The Second Circuit rejected the Petitioner's argument that the instruction constructively amended the Indictment to permit the jury to convict if it found that the defendants had violated Rule 10(B)-6, when they had only been indicted on the second count of violating Rule 10(B)-5. The Second Circuit noted that the appellants had failed to object on this ground at trial, and therefore such issue would be reviewed only under a plain error standard. The Second Circuit stated that to meet the plain error standard, the defendants would be required to demonstrate that there was (1) error, (2) that is plain, and (3) that affects substantial rights. The court stated that "[w]hile it is 'clear' that an indictment may not be constructively amended without violating the grand jury clause . . . applying this established rule to the particular

facts here does not result in an error that was either clear or obvious."

Importantly, the Second Circuit recognized that the district court also charged the jury to find that the conduct was done with the purpose of deporting buyers or sellers of securities. The Second Circuit stated that the jury "necessarily had to find that the defendant's intentionally engaged in conduct manipulative of the market and deceptive of investors - - the essence of a Criminal Rule 10(B)-5 violation - - in order to return a verdict against the defendants on Count 2." In sum, the Second Circuit acknowledged that such instruction was in error but then found that the error "would not have been plain error."

The Second Circuit also rejected the argument that counsel for the defendants had been ineffective by the failure to object to the inclusion of Rule 10(B)-6 in the jury charge. The court stated that there was no precedent that would indicate that a higher court would rule in the defendant's favor on such issue. Moreover, the court held that there was no showing of prejudice.

REASONS FOR GRANTING THIS PETITION

I. Based On This Court's Recent Decision in *Blakely v. Washington*, U.S. (2004), The Petitioner's Sentence Should Be Reduced Because His Sentence Was Imposed, In Part, Based On Facts Not Found By A Jury Or Stipulated By The Petitioner

In *Blakely v. Washington*, __ U.S. __ (2004), this

Court held "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts requested in the jury verdict or admitted by the defendant.*" This Court explained that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." Where "a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' . . . and the judge exceeds his proper authority." In the instance where a defendant pleads guilty, the Government is free to seek "judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial fact finding."

In regard to plea agreements, this Court stated in *Blakely* that "nothing prevents a defendant from waiving his *Apprendi* rights." Where "a defendant pleads guilty, the state is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial fact finding."

This Court in *Blakely* construed a guideline sentencing system enacted in the State of Washington. This Court made it clear that the Washington State sentencing scheme contained two types of statutory maxima, one set by the statute defining the crime as a felony and the other set by a sentencing guideline system. With regard to the sentencing guideline system, the Washington State sentencing judge could not impose a sentence above 53 months unless she explicitly found one or more additional facts. This Court held that the State judge could not impose a sentence in excess of 53 months because it would have required the judge to find

additional facts that had not been determined by a jury.

The reasoning in *Blakely* applies with equal force to the federal sentencing guidelines. Each federal offense carries with it a statutory maximum set by Congress. Congress also established the federal sentencing guidelines, which sets a lower statutory maximum (which is the base offense level for the crime, together with the defendant's criminal history category). A judge may not increase a defendant's sentence beyond the sentencing range set by the base offense level and criminal history category unless the judge finds one or more additional facts. Such "upward adjustment" provisions of the federal sentencing guidelines are as much unconstitutional under *Blakely* as the upward adjustment provisions contained in the Washington State sentencing scheme.

Justice O'Connor, writing in descent, agreed: "The fact that the federal sentencing guidelines are promulgated by an administrative agency nominally located in the judicial branch is irrelevant to the majority's reasoning." Rather, "[t]he structure of the Federal Guidelines . . . does not, as the Government halfheartedly suggest, provide any grounds for distinction. Justice O'Connor concluded that the enhancement provisions of the Federal Guidelines will likely "meet the same fate [as the Washington State enhancement provisions]."

Based on the foregoing, a federal judge may not increase a defendant's sentence under a guideline provision that requires the judge to find an additional aggravating fact, unless such fact concerns a prior conviction or was admitted by the defendant. This Court's decision in *Blakely* renders the following

categories of guideline provisions unconstitutional under the current scheme: (1) alternative enhanced base offense levels; (2) aggravating specific offense characteristics; (3) cross-references; (4) Chapter 3 aggravating factors; and (5) upward departures. Nor may a court take into account a defendant's purported relevant conduct, except when considering such relevant conduct within the guideline range set for the base offense level. A court may, however, apply applicable downward adjustments.

Based on *Blakely*, the Petitioner's sentence must be reduced based on the imposition of sentencing enhancements that were not found by the jury, stipulated by the parties or agreed to be determined by the judge as the fact finder. *See also, Ring v. Arizona*, 536 U.S. 584 (2002) (this Court struck down a state capital punishment scheme under which judges made factual findings necessary for the imposition of the death penalty); *Duncan v. Louisiana*, 391 U.S. 145 (1968) ("the guarantee of a jury trial . . . reflects a profound judgment about the way in which law should be enforced and justice administered"); *United States v. R.L.C.*, 503 U.S. 29 (1992)

In the case at bar, the Petitioner was sentenced on several factors that were not found by a jury, stipulated by the parties or permitted by the parties to be decided by the court. Specifically, the jury was only asked to decide whether the Petitioner was guilty of certain underlying offenses, but was not asked to determine the amount of the loss, or whether certain additional facts were involved in the alleged scheme, such as more than minimal planning, scheme to defraud

more than one victim, and abuse of position of trust. The jury was also not asked to determine restitution. The sentencing court imposed a sentence and the order of restitution based on all of the foregoing additional adjustments. Under this Court's decision in *Blakely*, such increase in the Petitioner's sentence and order of restitution violated his Sixth Amendment right to a trial by jury, and therefore his sentence should be accordingly reduced and the order of restitution vacated.

II. THE DISTRICT COURT ERRONEOUS INSTRUCTED THE JURY THAT A RULE 10(B)6 VIOLATION COULD SERVE AS THE BASIS FOR A CONVICTION UNDER COUNT 2 OF THE INDICTMENT

Although Count 1 of the Indictment alleged a conspiracy to violate S.E.C. Rules 10(B)-5 and 10(B)-6, Count 2 of the Indictment alleged a substantive violation of Rule 10(B)-5 only. The Petitioner was acquitted of Count 1 and convicted of Count 2. The record unambiguously reflects that the district court's charge to the jury permitted a guilty verdict under Count 2 based on a legal theory not contained in the Indictment. As such, the district court's instruction to the jury constituted an unlawful constructive amendment to the Indictment in violation of the grand jury clause of the Fifth Amendment.

The Fifth Amendment states, in pertinent part, that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of the grand jury." U.S. Constitution Amendment V. As such, a defendant may be only tried

on charges contained in an indictment that has been returned by a grand jury. "A constructive amendment occurs when the government's presentation of evidence and the district court's jury instructions combine to modify the essential elements of the offense charged to the point that there is a substantial likelihood that the defendant may have been convicted of the offense other than the one charged by the grand jury." *United States v. Wozniak*, 126 F.3d 105 (2d Cir. 1997); *United States v. Miller*, 471 U.S. 130, 138-45 (1985). "An unconstitutional amendment of the indictment occurs when the charging terms are altered, either literally or constructively." *United States v. Clemente*, 22 F.3d 477, 482 (2d Cir.) *cert. denied* sub nom. *Demolfitto v. United States*, 513 U.S. 900 (1994).

As stated by this Court, a conviction occurring through a constructive amendment of the indictment must be set aside even when there is sufficient evidence offered by the government at trial to support the conviction based on the allegations in the grand jury indictment. *See, Stirone v. United States*, 361 U.S. 212 (1960). As explained by this Court in *Ex Parte Bain*, 121 U.S. 1 (1887) "after the indictment [is] changed it [is] no longer the indictment of the grand jury who presented it."

Prejudice is presumed when there has been a constructive amendment. *United States v. Wozniak*, 126 F.3d 105 (2d Cir. 1997). *See, United States v. Miller*, 471 U.S. 130 (1985). While such presumption may be overcome by the Government, the record in this case is clear that the Government failed to do so. Petitioner was acquitted of conspiracy charges contained in Count 1, which alleged a conspiracy based on both Rule 10(B)-5 and Rule 10(B)-6. On summation, the Government argued at length on Count 2, the substantive Count, that

the Petitioner had violated Rule 10(B)-6 but did not argue a violation of Rule 10(B)-5. Such argument, coupled with the district court's erroneous jury instruction, left no doubt that the Petitioner was deprived of a fair trial and convicted of a crime for which he was not indicted.

Moreover, a conviction must be set aside where a verdict is supportable on one ground, but not on another, and there is no way to determine which ground the jury selected. *Yates v. United States*, 354 U.S. 298 (1957); *Stoomberg v. California*, 283 U.S. 359 (1931). In the case at bar, there is no way to determine under which theory the Petitioner was convicted. As a result, the conviction must be reversed.

Although there was no objection to the district court's instruction, the conviction should have been reversed on plain error grounds. *See, Johnson v. United States*, 520 U.S. 461 (1997). Based on the facts in this case, there was (1) error, (2) which was plain, and (3) that affected substantial rights. *See* Id. *See also* FRCP 52(b) (plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court"). The district court's jury instruction, which effectively amended the indictment by the addition of a crime that the grand jury chose not to charge, was plain error. The Second Circuit acknowledged that an error had occurred. Moreover, it is submitted that such error was clear and obvious. Particularly under the circumstances of this case, the error affected substantial rights.

III. THE PETITIONER WAS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY THE FAILURE OF COUNSEL TO OBJECT TO THE ERRONEOUS INSTRUCTION THAT A

RULE 10(B)-6 VIOLATION COULD SERVE AS A BASIS FOR A CONVICTION UNDER COUNT 2 OF THE INDICTMENT

The Sixth Amendment right to counsel exists to protect an individual's "fundamental right" to a fair trial. *Strickland v. Washington*, 466 U.S. 668, 684 (1984). A defendant is rendered ineffective assistance of counsel when "counsel's conduct so undermines the proper functioning of the adversarial process" that the proceeding "cannot be relied on as having produced a just result." Id. This Court in *Strickland* developed a two-component test to determine whether counsel was ineffective. A defendant must show (1) that counsel's performance was deficient, and (2) that such performance prejudiced the defense. Id. at 687.

A. The Performance Component Of The Strickland Test

In *Lockhart v. Fretwell*, 506 U.S. 364, (1993), this Court explained that the performance component of the *Strickland* test focuses on whether counsel's representation fell below an objective standard of reasonableness. *Lockhart*, Id. A court must "determine whether, in light of all the circumstances, the [lawyer's performance was] outside the range of professionally competent assistance." *Strickland* 466 U.S. at 690.

To be effective, counsel must, among other things, develop adequate theories of defense. *Strickland*, 466 U.S. at 690-91. This includes "an adequate investigation of facts, consideration of viable theories, and development of evidence to support those theories." *Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993). Counsel must "explore all avenues leading to facts

relevant to . . . degree of guilt or penalty." *Eldridge v. Atkins*, 665 F.2d 228, 232 (8th Cir. 1981), cert. denied, 456 U.S. 910 (1982).

B. The Prejudice Component Of The Strickland Test

The prejudice component of the *Strickland* test "focuses on the question whether counsel's deficient performance renders the result . . . unreliable or the proceedings fundamentally unfair." *Lockhart*, 506 U.S. at 371-72. Stated differently, counsel has rendered ineffective assistance when the errors are so prejudicial that the adversarial balance between defense and prosecution is upset, and the result is rendered suspect. *Lockhart*, 506 U.S. at 369-70.

A defendant must establish that, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. This Court declared that a "defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland*." *Kyles v. Whitley*,514 U.S. 419 (1995); quoting *Nix v. Whiteside*, 475 U.S. 157, 175 (1986). The reasonable probability standard "is not a sufficiency of the evidence test." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

C. Failure Of Trial Counsel To Object To Significant Jury Instruction

In determining whether a defendant has been rendered ineffective assistance of counsel by the failure of counsel to object to a significant jury instruction, courts

have applied the two-prong test of Strickland.. *See, James v. Artuz*, 29 Fed. Appx. 654 (2d Cir. 2002) (failure to object to accomplice-corroboration jury instruction as inadequate). *Aparicio v. Artuz*, 269 F.3d 78 (2d Cir. 2001). *United States v. Berkovich*, 168 F.3d 64 (2d Cir. 1999) (failure to object to "no ultimate kind" instruction"); *United States v. Brooks*, 82 F.3d 50 (2d Cir. 1996) (failure to object to instruction not to consider witness' assertion that Fifth Amendment privilege); *Henry v. Scully*, 78 F.3d 51 (2d Cir. 1996).

For example, in *Henry v. Scully*, 78 F.3d 51 (2d Cir. 1996), the court held that a defendant had been rendered ineffective assistance of counsel by the failure of counsel, among other things, to request a missing witness charge with respect to a confidential informant who did not testify at trial. In *Henry*, the court stated that there was "no downside to doing [requesting the instruction] and there was a potential benefit to be gained." Therefore, when viewed in conjunction with other errors by trial counsel, the defendant had been rendered ineffective assistance.

It is well settled "that in a criminal prosecution, the Government bears the burden of proving beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged." *United States v. Javino*, 960 F.2d 1137 (2d Cir. 1992); *Davis v. United States,* 160 U.S. 469, 487 (1995) (burden of proof "is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime."); *In Re Winship*, 397 U.S. 358, 364 (1970). The trial court must provide the jury with sufficient instructions to enable it to assess the evidence within the proper legal framework and to reach a rational verdict. *United States v. Parker*, 309 F.2d 91 (2d Cir.

1990).

A jury instruction is also erroneous if it misleads the jury regarding the correct legal standard or does not adequately inform the jury on the law. *United States v. George*, 266 F.3d 52 (2d Cir. 2001). In addition, a jury instruction is erroneous when the jury lacks a sufficient understanding of the issues and of its duty to determine the issues from the instructions. *See, United States v. VeSantiago-Flores*, 107 F.3d 1472 (10th Cir. 1997); *United States v. Jerde*, 841 F.2d 818 (8th Cir. 1988) (instructions must inform jurors of essential issues before them and of permissible ways of resolving those issues); *United States v. Wise*, 221 F.3d 140 (5th Cir. 2000) (the court must provide a correct statement of the law and instruction must clearly tell jurors of the principles of law applicable to the factual issues confronting them).

For example, a conviction was reversed where the jury instruction on the "knowledge" element of a crime was insufficient to guide the jury in its deliberation on that issue. *United States v. Sicignano*, 78 F.3d 69 (2d Cir. 1996). In *Sicignano*, the defendant was charged with conspiracy to distribute a controlled substance. The court held that a conscious avoidance instruction was insufficient where the trial court had failed to include a provision advising the jury that it could not find knowledge of a fact if the defendant actually believed to the contrary. Failure to include such a provision improperly permitted the jury to convict the defendant even though he may have honestly believed that he was not engaging in an illegal activity.

In the case at bar, counsel's performance was deficient and such performance prejudiced the defense where counsel failed to object to the jury instruction that

permitted the jury to find the Petitioner guilty of Count 2 of the Indictment under a legal theory that the Petitioner had violated Rule 10(B)-6 of the Securities and Exchange Act. Unquestionably, the erroneous instruction of the district court went to the heart of the case against the Petitioner, in that it permitted the jury to find the Petitioner guilty on a charge that had not been presented and issued by the grand jury. The error could not have been more clear. Even the Government effectively conceded that such instruction should not be given, where the Government submitted a proposed instruction that did not include a Rule 10(B)-6 violation. Prejudice to the Petitioner is obvious, in that it is highly likely that he would have been acquitted of Count 2 of the Indictment had the jury been correctly charged. The jury found the Petitioner not guilty of Count 1 of the Indictment and such acquittal provides strong evidence that the jury would not have found the Petitioner guilty of the substantiative count contained in Count 2 of the Indictment if a correct instruction was provided.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STATE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 4th day of September, two thousand and three.

PRESENT:

HON. ROBERT D. SACK,
HON. SONIA SOTOMAYOR,

Circuit Judges.

HON. GEORGE B. DANIELS, *

District Judge.

UNITED STATES,

Appellee,

-v-

MICHAEL NEWMAN, STEVEN ORANDELLO, STEVEN JAROSS, JAMESE MCINERNEY and DIFRISCO,

Nos. 02-1469 02-1471,02-1497, 02-1498, 02-1500

Defendants-Appellants.

Appearing for Appellants: GERALD B. LEFCOURT, Gerald B. Lefcourt, P.C. (Richard Ware)

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* Of the United States District Court for the Southern District of New York, sitting by designation.

Levitt, Diarmuid White, of counsel), New York, NY, for Defendant-Appellant Michael Newman.

MICHAEL R. BACHNER, Bachner & Herskovits, P.C., New York, NY for Defendant-Appellant Steven Orandello.

SALLY BUTLER, Steve Zissou & Associates (Steve Zissou, of counsel), Bayside, NY, for Defendant-Appellant Steven Jaross.

ELIZABETH FOX-MCDONOUGH, The Law Offices of Edward P. Jenks, Esq. (Edward P. Jenks, of counsel), Mineola, NY, for Defendant-Appellant James McInerney.

JOHN S. WALLENSTEIN, Mineola, NY, for Defendant-Appellant Victor DiFrisco.

Appearing for Appellee: CAROLYN POKORNY, Assistant United States Attorney (Roslynn R. Mauskopf, United States Attorney for the Eastern District of New York, David C. James, Assistant United States Attorney, of counsel), Brooklyn, NY.

Appeal from judgments of the United States District Court for the Eastern District of New York (Leonard D. Wexler, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgments be, and they hereby are AFFIRMED.

The appellants in this appeal were convicted by a jury of violating Section 10b of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) & 78ff(a), by wilfully violating Securities Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5. The appellants appeal their convictions, and one appellant, Newman, also appeals his sentence.

The fraud of which the appellants were accused involved what is colloquially known as a "pump and dump" scheme, in which a person artificially raises the market price of a security in which he or she has an

interest (the "pump") so that he or she can sell the security at a profit (the "dump"). The appellants were stock brokers employed by Kensington Woods, a now-defunct brokerage, which fraudulently manipulated the market for securities in companies whose initial public offerings it had underwritten.

The defendant brokers were charged with one count of conspiring to violate Section 10b of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) & 78ff(a), by violating Securities Exchange Act Rules 10b-5 and 10b-6 (rescinded Jan. 7, 1997), and one count of violating Section 10b by violating Rule 10b-5. Each defendant was acquitted of the first count, and convicted of the second.

[CONSTRUCTIVE AMENDMENT & INEFFECTIVE COUNSEL]

During summation, the government argued that the appellants were guilty on the second count because they had violated Rule 10b-6. The jury was instructed that it could convict if it found that the Appellants had violated Rule 10b-6 for the purpose of manipulating the market. On appeal, the appellants argue that the instruction and summation constructively amended the indictment to permit the jury to convict if it found that the appellants had violated Rule 10b-6, when they had only been indicted on the second count of violating Rule 10b-5. A constructive amendment "occurs when the government's presentation of evidence and the district court's jury instructions combine to 'modify essential elements of the offense charged to the point that there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged by the grand jury.'" *United States v. Wozniak*, 126 F.3d 105, 109 (2d Cir. 1997) (quoting *United States v.*

Vebeliunas, 76 F.3d 1283, 1290 (2d Cir. 1996)). Because the appellants failed to object on this ground at trial, we review the claim for plain error. Fed. R. Civ. P. 52(b).

> The framework of the analysis for plain error pursuant to Rule 52(b) is the four-pronged test set forth in *United States v. Olano*, 507 U.S. 725, 732 (1993). Before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

United States v. Thomas, 274 F.3d 655, 667 (2d Cir. 2001) (in banc) (citations, internal quotation marks, and alterations omitted).

While it is clear that an indictment may not be constructively amended without violating the grand jury clause, *see, e.g., Stirone v. United States*, 361 U.S. 212, 217 (1960), applying this established rule to the particular facts here does not result in an error that was either clear or obvious. The Rule 10b-5 count under which the appellants were convicted incorporated by reference those acts of pre-selling alleged in support of the indictment's charge that the appellants conspired to violate Rule 10b-6, and they therefore had notice that acts of pre-selling in violation of Rule 10b-6 would be used by the prosecution to prove the 10b-5 charge. Violations of Rules 10b-5 and 10b-6, moreover, are violations of the same criminal provision, Section 10b of

the Securities Exchange Act of 1934, and carry the same sentence. *See* 15 U.S.C. § 78ff(a); U.S.S.G. § 2B1.1 (2002); Id. § 2F1.1 (1998), *Goldstein v. Regal Crest*, 62 F.R.D. 571, 574 (E.D. Pa. 1974). Parenthetically, the only case to date of which we are aware that has addressed the question of whether Rule 10b-5 is violated when a defendant violates Rule 10b-6 with the intent of manipulating the market held in the affirmative. *See Pappas v. Moss*, 257 F. Supp. 345, 364 & n. 6 (D.N.J. 1966) (citing *§ v. Scott Taylor & Co..*, 183 F. Supp. 904, 906-09 (S.D.N.Y. 1959)). We therefore conclude that it is not clear or obvious that the indictment charged an offense other than the one the jury instruction and government's summation allowed the jury to convict for.

Further, the charge also required the jury to find that the conduct was done with the purpose of defrauding buyers or sellers of securities. Because the district court charged the jury that it had to find an intent to defraud to convict on Count 2, and also told the jury that in "the context of market manipulation, to defraud means intentional or willful conduct that is designed to defraud or deceive investors by artificially controlling or fraudulently affecting the price of securities," the jury necessarily had to find that defendants intentionally engaged in conduct manipulative of the market and deceptive of investors - - the essence of a criminal Rule 10b-5 violation - - in order to return a verdict against the defendants on Count 2. Even if it was error to instruct the jury that it could convict on Count 2 if it found a violation of either Rules 10b-5 or 10b-6, then, this error would not have been plain error.

Appellants' alternate contention, that their counsel were constitutionally ineffective for failing to object to the inclusion of Rule 10b-6 in the jury charge fails for similar reasons. We have held that counsel is ineffective for failing to object to a jury instruction when "precedent

supported a 'reasonable probability' that a higher court would rule in [the] defendant's favor," *Bloomer v. United States*, 162 F.3d 187, 193 (2d Cir. 1998)), but there is no such precedent here. The appellants have not, under the first prong of *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984), defeated the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," or established that counsel's performance "fell below an objective standard of reasonableness." Even if failing to object to the erroneous inclusion of Rule 10b-6 in the charge on Count Two fell below an objective standard of reasonableness, moreover, because the charge required a showing of intent to manipulate the market, we conclude that no showing of prejudice has been made under *Strickland's* second prong, "that there is a reasonable probability that, but for counsel's [allegedly] unprofessional errors, the result of the proceeding would have been different." Id.

[FAILURE TO INSTRUCT JURY THAT CERTAIN ACTS WERE NOT CRIMINAL]

The appellants contend that the district court erred in declining to instruct the jury that certain regulatory violations were not violations of Rule 10b-5. The district court ruled that since the prosecution had contended that the violations were "pat of the plan and scheme of manipulation . . . the government may bring [them] out." The court later instructed the jury that to convict, it had to find "intentional or willful conduct that [was] designed to defraud or deceive investors by artificially controlling or fraudulently affecting the price of securities." Defense counsel had an opportunity to argue their position that the regulatory violations were not manipulative of the market to the jury. We conclude that there was no error in the district court's ruling.

[PREJUDICIAL CLOSING ARGUMENTS]

The appellants argue that they were prejudiced by the government's summation. To require reversal, summation comments must "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." *Gonzalez v. Sullivan*, 934 F.2d 419, 424 (2d Cir. 1991) (quoting *Donnelly v. DeChristoforo*, 4165 U.S. 637, 643 (1974) (alteration in original)).

Most of the comments complained of were entirely proper, either independently or as appropriate responses to arguments made by the defense. While it was arguably improper for the prosecutor to refer to defense counsel's argument that violating Rule 10b-6 did not constitute market manipulation as a "neat little trick," "total bunk," and requiring "audacity," since the appellants failed to object to these comments at trial, they are grounds for vacating a conviction only if they constituted "flagrant abuse." *United States v. Rivera*, 22 F.3d 430, 437 (2d Cir. 1994) (citing *United States v. Ortiz*, 857 F.2d 900, 904 (2d Cir. 1988), *cert. denied*, 489 U.S. 1070 (1989)). We do not think the comments complained of can properly be described as flagrant abuse.

It was also improper as to Newman, Orandello and McInerney for the government to point out to the jury that those appellants had previously worked for another brokerage which was notorious for engaging in schemes similar to the one charged, because that evidence had only been admitted against DiFrisco and Jaross. Any prejudice caused by the comment was cured by a limiting instruction given by the district court.

[SUFFICIENCY OF THE EVIDENCE]

Jaross, McInerney and DiFrisco argue that the

evidence introduced at trial was insufficient to sustain their convictions. An appellant raising such a claim carries the "heavy burden," *United States v. Scarpa*, 913 F.2d 993, 1003 (2d Cir. 1990), of establishing that "reasonable jurors must necessarily have had a reasonable doubt as to [his or her] guilt," *United States v. Brown*, 776 F.2d 397, 402 (2d Cir. 1985).

The government introduced direct evidence that Jaross, McInerney and DiFrisco either pre-sold stock or misrepresented the stock to customers, and testimony regarding their knowledge of and participation in the "no net sales" policy and special secret incentives given for selling the company's shares to investors. Upon review of the evidence introduced at trial, we cannot conclude that a reasonable jury must necessarily have had a reasonable doubt regarding any of the appellants' guilt.

[LOSS ATTRIBUTABLE TO NEWMAN]

None of Newman's arguments on appeal with respect to his sentencing were raised in the district court with sufficient specificity to alert the district court to the nature of Newman's objections, and we therefore apply plain-error review. *See, United States v. Sofsky*, 287 F.3d 122, 125-26 (2d Cir. 2002) (plain-error review applies to review of sentencing errors not objected to, with exceptions not relevant here).

Newman contends that the district court improperly calculated the loss attributable to him for sentencing purposes. The district court calculated the difference between the price of the stock during the fraud and its price after the fraud ended, and multiplied that sum by the number of shares attributable to Newman.

A district court at sentencing is not required to "determine[ ] the loss with precision [, it need] only make a reasonable estimate of the loss, given the available information." U.S.S.G. § 2F1.1 cmt. 9 (1998). Newman presented no evidence to the district court to aid it in differentiating between that portion of the decline of the company's stock price attributable to a decline in its business prospects, if any, as opposed to market manipulation. Whether or not such evidence, had it been presented, would have affected the analysis, the district court calculation based on the evidence before it was not plainly erroneous.

Newman also argues that he is not responsible for manipulation of the market by Kensington Woods' principals. The government introduced evidence indicating that even if Newman was not aware of all of the methods used to manipulate the price of the securities, he was aware that manipulation was going on. The losses caused by those methods of market manipulation are attributable to Newman for sentencing purposes. *See* U.S.S.G. § 1B1.3(a) (1) (B) (1998).

Newman also argues that Kensington Woods bore some of the loss when it was forced, as the market-maker, to purchase the company's stock back from customers who wanted to sell. As we have just noted, a district court at sentencing is not required to "determine[ ] the loss with precision [, it need] only make a reasonable estimate of the loss, given the available information." U.S.S.G. § 2F1.1 cmt. 9)1998). Because Newman introduced no evidence supporting his contention that Kensington Woods bore a portion of the loss, the district court's estimate of the loss, which did not take into account re-purchases by the brokerage, was reasonable.

Newman also argues that he should not have to

pay $600,000 in restitution to a customer who suffered a portion of his loss after Newman left Kensington Woods. The customer's loss is attributable to Newman because he personally convinced that customer to purchase the stock.

For the foregoing reasons, the judgments of the District Court are hereby AFFIRMED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

_____ _____

_____By: Date